Filed 5/25/11 In re Thompson CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re DEMON THOMPSON, on Habeas Corpus.	B226456 (Los Angeles County Super. Ct. No. BH006664)

APPEAL from an order of the Superior Court of Los Angeles County, Peter Espinoza, Judge. Affirmed in part and reversed in part.

Edmund G. Brown Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Jessica N. Blonien and Yun Hwa Harper, Deputy Attorneys General, for Plaintiff and Appellant.

Brandie Devall for Defendant and Respondent.

In June 1987, defendant and respondent Demon Thompson, who was then a 17-year-old gang member, exchanged gunshots with rival gang members in a public park. Nine-year-old Deandre Brown was caught in the crossfire and killed. Thompson pleaded guilty to second degree murder with a firearm enhancement, and was sentenced to a term of 17 years to life. In May 2009, a panel of the Board of Parole Hearings (Board) found him suitable for parole. In October 2009, former Governor Arnold Schwarzenegger reversed the Board's decision, concluding Thompson's release would pose an unreasonable risk to public safety. In a petition for a writ of habeas corpus filed in the superior court, Thompson challenged the Governor's decision on the ground it was not supported by the evidence. The superior court agreed with Thompson, and accordingly ordered the Governor's decision vacated, the Board's decision reinstated, and Thompson released in accordance with the parole date calculated by the Board. Appellant, the warden of the prison where Thompson is incarcerated (hereinafter Warden), appeals from the trial court's order, contending (1) some evidence supported the Governor's decision and (2) the remedy ordered by the superior court was improper. Like the trial court, we conclude that the Governor's decision was not supported by some evidence. We affirm the trial court's grant of Thompson's habeas petition. As explained more fully herein, we remand the matter to the Board to allow it to proceed in accordance with its usual procedures for release of an inmate on parole.

FACTUAL AND PROCEDURAL BACKGROUND

Except as further discussed *ante,* the facts underlying the commitment offense and the history of Thompson's parole hearings are not in dispute.

1. *Thompson's background, the commitment offense, and conviction.*

Petitioner Thompson was born in June 1969, to an unmarried mother, in Los Angeles. The family lived with Thompson's maternal grandparents. When Thompson was less than a year old, his grandfather was painting the kitchen. A rag he was using accidentally ignited. In a panic, he threw it to the floor. It landed on a container of paint thinner, causing an explosion and engulfing the kitchen in flames. Thompson, who had crawled into the kitchen, was severely burned over 90 percent of his

body, including his head, torso, and hands. Thompson's father committed suicide the same week, apparently wracked with guilt over the fire; although he had been supposed to pick the baby up prior to the time the fire started, he had failed to do so because he had been intoxicated the previous evening.

Thompson spent the next few years in a hospital burn unit. The burns caused extensive scarring, including over his entire head and face. When he was about five, he returned to live at his grandparents' residence so he could attend school. Several of the grandparents' daughters and their children also resided at the home. The children attacked and made fun of Thompson due to his appearance. Thompson's mother, who was a cocaine user, was "overwhelmed" and did not know what to do to assist him. Thompson suffered from a speech impediment in addition to his scarring. At school he was taunted and humiliated by other children. His self-esteem suffered, causing him to isolate himself. Although he is of average intelligence, he was placed in special education classes. When he was approximately seven years old, he was molested by a stranger in a park.

Thompson was subsequently placed in mainstream classes; however, he stopped attending school after ninth grade, when classmates laughed at his inability to read. Around that time, he was befriended by a young man named Shawn. Shawn was a few years older than Thompson and was a member of the Menlow Gangster Crips gang. When Thompson's mother told him to go to school or get out of the house, Thompson began living with Shawn. Between the ages of 15 and 16, Thompson joined the gang in an effort to be accepted and "please people." Unlike Thompson's peers at school, the other gang members accepted him regardless of his scars and did not tease him. Shawn became like a brother to Thompson. He treated him with respect, acted as if Thompson's scars did not matter, and encouraged Thompson to believe in himself.

Thompson's troubles with the law were connected to his gang membership. He used marijuana and drank alcohol occasionally when associating with the gang. He also sold drugs for the gang. In early 1987, Thompson and several other gang members assaulted another youth, with whom they had a dispute, with "a milk crate, feet, and

fists." The victim's uncle was positioned on a nearby rooftop and shot at the gang members, injuring Thompson and killing another boy. A juvenile petition for battery was sustained against Thompson for his role in the incident.

Thompson committed the life offense on June 24, 1987. On that date, rival gang members from the 74th Hoover Crips drove by a residence frequented by the Menlow Gangster Crips, and fired a volley of shots, killing Shawn. Furious and distraught, Thompson sought revenge. He learned that members of the rival gang were congregating at Mount Carmel Park. Against the advice of his associates, and without their assistance, that afternoon Thompson took a gun to the park. He observed rival gang members on the basketball court and exchanged gunfire with them. Neither Thompson nor the rival gang members were hurt. However, a stray bullet hit and killed nine-year-old Deandre Brown. The child had been playing in a sand lot when he was caught in the crossfire. The bullet partially severed his spinal cord.

Thompson, unaware the child had been shot, returned to the gang house. In part due to his distinctive scarring, he was readily identified by witnesses and arrested the following day. He denied committing the shooting and initially told police others were to blame. He nonetheless pleaded guilty to second degree murder with a firearm enhancement, and was sentenced to a term of 17 years to life. He was 17 years old at the time of the shooting.

2. *Post-conviction conduct and circumstances.*

Thompson was initially housed at the California Youth Authority (CYA), beginning in June 1990. During the three years he was there, he was disciplined approximately 10 times for misconduct, including fighting, gang writing, and indecent exposure. As a result, in 1993 he was transferred to the custody of the California Department of Corrections (CDC).

While in prison, Thompson's behavior markedly improved. He completed his education, earning his GED. At the time of the 2009 parole hearing, he had successfully completed one college class and had started another. He had completed extensive vocational training, receiving certifications in the areas of horticulture, landscaping,

masonry, drywall, office services, and graphic arts. He had also taken classes in mill and cabinetry, and garment trades. He completed a paralegal correspondence course. Thompson also "programmed" extensively, completing courses in anger management, "Cage Your Rage," and parenting. He completed three stages of an "Alternatives to Violence" course, enabling him to be a facilitator for the program. He had spent 24 hours serving as a workshop facilitator. He had worked as a porter. He participated in the Toastmasters program, earning the distinction of being named a bronze-level "advanced communicator." He also served as a motivational speaker, worked with a Christian Ministries group, and was a deacon in a prison church group. He had participated in Alcoholics Anonymous (AA) for 18 years, and Narcotics Anonymous (NA) for 17 years; completed a course entitled "Understanding Borderline Personality Disorders and Addictions"; and served as a substance abuse prevention mentor. Although he did not have a substance abuse problem himself, he found the meetings helpful. His work reports were average to above average. At the suggestion of the Board, he briefly participated in therapy in 1998 with satisfactory results. Additionally, he had participated in a community service project preparing Easter baskets and had donated $500 to victims of Hurricane Katrina. The 2009 panel commended Thompson for his activities, stating that he had been "awfully busy in a very positive way" and had "done very well." Thompson also married while in prison, in 1997; he met his wife after she saw him perform in a play while he was housed at the youth authority.

Thompson had not associated with gang members, and had had no gang involvement, since being transferred to prison in 1993. At the 2009 hearing, he explained that he was "an advocate against gangs and everything they represent." He had joined the gang because he was "so eager to have people like me, you make some bad choices." He had suffered from low self-esteem and thought gang membership would make him feel better about himself. At the 2009 hearing, he characterized the gang life as "horrible. It's foolish, a complete and utter waste of time. It destroys people . . . . On the one hand you think that . . . this stuff is going to somehow validate you, and make you feel better . . . but that is not the truth. What happens is you actually lose yourself . . . ."

Thompson explained that being in a gang was the "dumbest, stupidest thing I could have ever done . . . ." While in prison, he had attempted to steer other inmates "away from that [idiocy]." He encouraged younger inmates to educate and believe in themselves, rather than looking to others for validation. Thompson believed that "answers for a person who suffers from low self-esteem [are] within themselves, and all they have to do is believe, and work hard, and educate themselves, and life will be okay." A 2007 psychological evaluation noted that, "[a]ll reports and Mr. Thompson's presentation indicate that he did not join the gang from psychopathy or hostile intent. Rather it provided acceptance, companionship and comfort that he did not experience elsewhere."

Between 1993, when he was transferred to the Department of Corrections, and the 2009 hearing, Thompson committed two serious rules violations (CDC 115's)[1] and was counseled five times for minor misconduct (CDC 128-A's),[2] a record the presiding commissioner characterized as favorable. None of the incidents involved violence.

The most recent psychological evaluation on Thompson, prepared in 2007, concluded that he presented a low risk of violent reoffense should he be paroled. He presented as "open, thoughtful, and gentle," showed maturity and awareness, and lacked bitterness or anger. He exhibited an appropriate range of emotions, and his prison history demonstrated increasingly responsible and unselfish behavior. He was "able to adequately analyze and explain his motivations, the social pressures and stressors acting in his youth, and his responses to them." Thompson could articulate alternatives to violence and socially acceptable ways of meeting his needs. At the 2009 hearing,

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[1] A " 'CDC 115' " refers to a rules violation report that documents misconduct that is believed to be a violation of law or is not minor in nature. (*In re Roderick* (2007) 154 Cal.App.4th 242, 249, fn. 3; Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).)

[2] A "Custodial Counseling Chrono" (CDC Form 128-A) documents minor misconduct and counseling provided for it. (*In re Roderick, supra,* 154 Cal.App.4th at p. 269, fn. 23; *In re Smith* (2003) 109 Cal.App.4th 489, 505; Cal. Code Regs., tit. 15, § 3312, subd. (a)(2).)

Thompson explained that he had learned to control anger by meditation, exercise, and communication.

Similarly, a 2002 psychological evaluation concluded Thompson "is at very low risk [of] re-offending if released to the community." The examiner opined, "From a psychiatric standpoint, Mr. Thompson could be successfully returned to the community. He shows real commitment to a pro-social lifestyle, even in prison. His crime was a single horrible episode that Mr. Thompson deeply regrets."

A 1999 psychological evaluation concluded that Thompson had "managed himself increasingly well as he matures . . . . This is a youngster who the [Board of Prison Terms] must seriously consider for release given his continued progress from fifty points to a level II twenty-five points, absence of significant disciplinary issues, and persistent efforts to improve his educational and vocational skills levels." The examiner characterized the life crime as "a single event that arose from a particularly traumatic loss and an explosive outburst . . . ." None of the three psychological evaluations in the record indicate any "psychiatric diagnoses or problems."

Thompson has consistently expressed remorse for the killing, showing a "great . . . sense of remorse" as long ago as 1989. At the 2009 hearing, he stated that he thought daily about the fact an innocent child had been killed.

3. *2009 parole suitability proceedings.*

As noted, Thompson has been incarcerated for almost 24 years, since June 1987. His minimum parole eligibility date was November 26, 1998. Thompson was apparently found unsuitable for parole on numerous occasions prior to 2009. At the 2009 parole hearing, Thompson presented a variety of letters showing he had offers of employment, housing, and financial support if paroled. The Board found him suitable for parole. The Board acknowledged that the commitment offense was disturbing. After weighing the negative factors of Thompson's former criminality, gang membership, and initial poor performance in CYA against his positive adjustments and accomplishments in prison, however, it found his release no longer posed a risk to society. The Board found the crime, as well as Thompson's gang membership, was due to the stress resulting from his

life circumstances. His age and psychological evaluations indicated he was a low risk for violent reoffense. In the Board's view, Thompson had "turned a corner " and had insight into the causes of the crime. The Board also commended Thompson for persevering in the face of prior parole denials. Employing the relevant matrix (see Cal. Code Regs., tit. 15, § 2282 & § 2403), the Board concluded Thompson had "more than fulfilled your time of incarceration."

4. *Governor's reversal.*

On October 5, 2009, the Governor reversed the Board's suitability finding. The Governor considered the relevant factors, acknowledging that Thompson had made "creditable gains" in prison. In his view, however, three factors indicated Thompson's release on parole would pose an unreasonable risk of danger to society. First, the Governor cited the "especially heinous" nature of the commitment offense, in which an innocent child had been killed due to Thompson's " 'senseless, mindless, atrocious gang[-]related shooting.' " Second, the Governor expressed concern that Thompson had "not yet gained sufficient insight into the murder or accepted full responsibility for the offense." In support, the Governor observed that Thompson had initially denied responsibility for the shooting to police, and his statements over the years regarding the circumstances of the crime had been contradictory. The Governor also pointed to a single response by Thompson in the 2009 hearing, in which he stated he had " 'no idea' " why he became violent on the date of the murder. Third, the Governor expressed concern that Thompson's history of discipline in prison demonstrated his "inability to conform his behavior to the rules," suggesting he was not ready to follow the rules of society or obey conditions of parole.[3]

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[3] The Governor's decision mentions that information provided to a probation officer in the late 1980's indicated Thompson was suspected of participating in other murders. However, these suspicions were never substantiated and Thompson was never charged with or prosecuted for additional murders. The Governor appropriately does not appear to have relied upon this information as a basis for his unsuitability finding. Although the Board, and the Governor, are required to consider all relevant, reliable information, the mere suspicions referenced by the Governor bear no indicia of reliability.

5. *Petition for writ of habeas corpus and Warden's appeal.*

Thompson challenged the Governor's reversal via a petition for a writ of habeas corpus filed on January 28, 2010. He urged that the Governor's reversal was not supported by some evidence and should be set aside, and sought reinstatement of the parole date set by the Board. After a thorough analysis of the record, the trial court concluded the Governor had failed to articulate a nexus between the cited factors and current dangerousness. Citing our decision in *In re Masoner* (2009) 179 Cal.App.4th 1531, 1541 (*Masoner*), the court determined that reconsideration by the Governor would be futile. Accordingly, the court ordered the Governor's reversal vacated, the Board's May 13, 2009 decision reinstated, and Thompson released in accordance with the date calculated by the Board.

The Warden filed a timely notice of appeal and a petition for a writ of supersedeas. We granted the petition and ordered the superior court's July 15, 2010 order stayed pending further order of this court.

DISCUSSION

1. *Applicable legal principles.*

"The granting of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals as soon as possible and alleviate the cost of maintaining them in custodial facilities." (*In re Vasquez* (2009) 170 Cal.App.4th 370, 379, italics omitted; *In re Twinn* (2010) 190 Cal.App.4th 447, 460.) Pursuant to Penal Code section 3041, the Board shall normally set a parole release date one year prior to an inmate's minimum eligible parole release date, unless it determines that public safety requires a lengthier period of incarceration. (Pen. Code, § 3041, subds. (a) & (b); *In re Shippman* (2010) 185 Cal.App.4th 446, 454; see also *In re Lawrence* (2008) 44 Cal.4th 1181, 1204; *In re Gomez* (2010) 190 Cal.App.4th 1291, 1304.) Release on parole is the rule, rather than the exception. (*In re Vasquez, supra,* at pp. 379-380; *In re Twinn, supra,* at p. 460.)

The decision whether to grant parole is "a subjective determination, guided by a number of factors, some objective, identified in Penal Code section 3041 and the Board's regulations." (*In re Twinn, supra*, 190 Cal.App.4th at pp. 460-461; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 660-661; Cal. Code Regs., tit 15, §§ 2281, 2402.) In making the suitability determination, the Board and Governor must consider "the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

Circumstances tending to establish unsuitability for parole include that the prisoner (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) has a previous record of violence; (3) has an unstable social history; (4) has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison or jail. (Cal. Code Regs., tit. 15, § 2402, subd. (c); *In re Lawrence, supra*, 44 Cal.4th at p. 1202, fn. 7; *In re Rosenkrantz, supra*, 29 Cal.4th at pp. 653-654.)

Circumstances tending to show suitability for parole include that the inmate (1) does not have a juvenile record of assaulting others or committing crimes with the potential of personal harm to victims; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his or her life, especially if the stress built up over a long period; (5) committed the crime as a result of Battered Woman Syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release, or has developed marketable skills that can be put to use upon release; and (9) has engaged

in institutional activities suggesting an enhanced ability to function within the law upon release. (Cal. Code Regs., tit. 15, § 2402, subd. (d); *In re Lawrence, supra,* 44 Cal.4th at p. 1203, fn. 8; *In re Rosenkrantz, supra,* 29 Cal.4th at p. 654.)

The foregoing factors are general guidelines, "illustrative rather than exclusive," and all reliable, relevant information must be considered. (*In re Twinn, supra,* 190 Cal.App.4th at p. 462; *In re Lawrence, supra,* 44 Cal.4th at p. 1203; *In re Gomez, supra,* 190 Cal.App.4th at p. 1304; *In re Reed* (2009) 171 Cal.App.4th 1071, 1080; Cal. Code Regs., tit. 15, § 2402, subd. (b).) The paramount consideration is public safety. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254; *In re Lawrence, supra,* at p. 1210; *In re Twinn, supra,* at p. 463; *In re Moses* (2010) 182 Cal.App.4th 1279, 1304.)

When the Board determines an inmate convicted of murder is suitable for parole, the Governor has the constitutional authority to conduct a de novo review and affirm, modify, or reverse the Board's decision. (Cal. Const., art. V, § 8, subd. (b); Pen. Code, § 3041.2; *In re Twinn, supra,* 190 Cal.App.4th at p. 461; *In re Ross* (2010) 185 Cal.App.4th 636, 638.) The Governor's review must be based on the same factors considered by the Board (Cal. Const., art. V, § 8, subd. (b); Cal. Code Regs., tit. 15, § 2402, subds. (c) & (d); *In re Lawrence, supra,* 44 Cal.4th at p. 1204; *In re Rosenkrantz, supra,* 29 Cal.4th at pp. 660-661), and on " 'materials provided by the parole authority.' " (*In re Twinn, supra,* at p. 461; *In re Gomez, supra,* 190 Cal.App.4th at p. 1305; Pen. Code, § 3041.2, subd. (a).) However, the Governor has discretion to be " 'more stringent or cautious' " than the Board in determining whether a defendant poses an unreasonable public safety risk. (*In re Shaputis, supra,* 44 Cal.4th at p. 1258; *In re Prather* (2010) 50 Cal.4th 238, 257, fn. 12 (*Prather*).)

2. *Standard of Review.*

When a superior court grants relief on a petition for habeas corpus without an evidentiary hearing, we review the decision de novo. (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1192; *In re Rosenkrantz, supra,* 29 Cal.4th at p. 677; *In re Criscione* (2009) 180 Cal.App.4th 1446, 1458.) Our review of the Governor's decision, on the other hand, is deferential. (*In re Lawrence, supra,* 44 Cal.4th at p. 1204; *In re Shaputis,*

supra, 44 Cal.4th at p. 1254; *In re Rosenkrantz, supra,* at p. 665.) "[T]he judicial branch is authorized to review the factual basis of a decision . . . denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation." (*In re Rosenkrantz, supra,* at p. 658; *In re Lawrence, supra,* at pp. 1204-1205.) "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence" are matters within the authority of the Governor. (*In re Rosenkrantz, supra,* at p. 677; *In re Lawrence, supra,* at p. 1226.) "[T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports" the decision. (*In re Rosenkrantz, supra,* at p. 677; *In re Shaputis, supra,* at pp. 1260-1261; *In re Lawrence, supra,* at p. 1204; *In re Burdan* (2008) 169 Cal.App.4th 18, 28.)

On the other hand, the standard of judicial review of parole decisions does not convert a reviewing court into a "potted plant" (*In re Scott* (2004) 119 Cal.App.4th 871, 898; *In re Gomez, supra,* 190 Cal.App.4th at p. 1306), nor is it " 'toothless.' [Citation.] '[I]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights.' " (*In re Criscione, supra,* 180 Cal.App.4th at p. 1458.) The relevant inquiry is "whether some evidence supports the decision of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. [Citations.]" (*In re*

Lawrence, supra, 44 Cal.4th at p. 1212, italics omitted.) Simply pointing to the existence of an unsuitability factor is insufficient. "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Id.* at pp. 1211-1212; see also *In re Criscione, supra,* at p. 1458.)

3. *The Governor's reversal of the Board's suitability finding was not supported by "some evidence."*

With these principles in mind, we consider whether the Governor's reversal of the Board's suitability finding was supported by "some evidence." We conclude it was not. The majority of the applicable statutory factors favor a suitability finding. Thompson's age, almost 40 at the time of the last hearing, somewhat reduces the likelihood of recidivism. (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1109, disapproved on other grounds in *In re Prather, supra*, 50 Cal.4th at p. 252.) Neither the Board nor the Governor found fault with his parole plans. Thompson has a variety of marketable skills which should allow him to obtain employment upon release. He has engaged in institutional activities that have enhanced his ability to function within the law upon release, including obtaining his GED, obtaining certifications in a variety of trades, participating in AA and NA, and completing numerous self-help courses. Except for the single work-stoppage incident, he had not engaged in any serious misconduct for the 10 years preceding the hearing. While in CDC custody, Thompson has engaged in no violent conduct. The most recent psychological evaluation, as well as a 2002 evaluation, indicated that his risk of violent reoffense is low. He does not suffer from psychiatric problems, and committed the instant offense as a result of stress. He has consistently demonstrated remorse for the crime. It appears undisputed that he has renounced his gang membership and has had no gang ties since being transferred to prison in 1993. "This circumstance is important because, in the absence of [Thompson's] gang membership—the driving force behind the murder—his conduct is unlikely to recur."

(*In re Rico* (2009) 171 Cal.App.4th 659, 685, disapproved on other grounds in *Prather, supra,* 50 Cal.4th at pp. 252-253.)

As noted, the Governor relied upon three factors in concluding that, despite the favorable factors, Thompson's release would pose a risk of danger to the public: (1) the "especially heinous" nature of the commitment offense; (2) Thompson's failure to gain sufficient insight into the murder or accept full responsibility for the offense; and (3) Thompson's purported inability to conform his behavior to prison rules.

a. *Circumstances of the commitment offense.*

There is no doubt the commitment offense was especially heinous, as the Governor concluded. The shooting was carried out in a manner demonstrating an exceptionally callous disregard for human suffering. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(D).) Thompson shot multiple rounds at gang rivals across a public park, without regard for the children and adults who were there enjoying the facilities. As a result, an innocent nine-year-old boy, who was simply playing in a sand lot, was killed. Gang shootings such as the one committed by Thompson terrorize neighborhoods and pose an extremely serious threat to the community. (See generally *In re H.M.* (2008) 167 Cal.App.4th 136, 146.) Moreover, although Thompson did not intend to hit the victim, he did target multiple gang rivals. It is difficult to imagine a more callous disregard for human life than that demonstrated by a gang member who shoots indiscriminately, without regard for innocent bystanders, especially including children such as the young victim here.

The fact the crime was especially heinous, however, does not end our inquiry given the substantial passage of time since the offense and Thompson's achievements in prison. While the aggravated nature of the inmate's offense can, by itself, constitute a sufficient basis for denying parole, that is so only when the circumstances of the commitment offense, considered in light of other facts in the record, continue to be predictive of current dangerousness many years after commission of the offense. (*In re Lawrence, supra,* 44 Cal.4th at p. 1221; *In re Shaputis, supra,* 44 Cal.4th at p. 1255; *In re Rosenkrantz, supra*, 29 Cal.4th at p. 682; see also *In re Scott* (2005) 133 Cal.App.4th 573,

594-595.) "[T]he aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post[-]incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative [to] the statutory determination of a continuing threat to public safety." (*In re Lawrence, supra,* at p. 1214.)

b. *Prison discipline.*

The Governor also relied upon Thompson's institutional history as an indicator of current dangerousness. The Governor explained: "I am concerned by Thompson's inability to conform his behavior to the rules. He was disciplined as recently as 2003, for participating in a work stoppage. He was counseled as recently as 2002, for failure to follow procedures and failure to follow a direct order. The fact that Thompson recently required discipline and counseling regarding inappropriate prison conduct demonstrates that he is still either unwilling or unable to follow rules," indicating he is "not yet ready to conform his conduct to the rules of society or obey the conditions of parole and that his release would still present a risk to the community."

The fact an inmate has engaged in serious institutional misconduct while incarcerated may be a circumstance tending to indicate unsuitability for parole. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(6).) Between 1993, when Thompson was transferred from the Youth Authority to the Department of Corrections, and the 2009 parole hearing, he committed two serious rules violations. One, in 1996, was for failing to follow a direct order. The record sheds no further light on the nature of this incident, and the Governor does not expressly rely upon it; we therefore disregard it. The 2003 rules violation was, as the Governor noted, issued for Thompson's participation in a work stoppage. Various comments at the 2009 and earlier hearings suggest that hundreds of inmates participated in the work stoppage action and were issued CDC 115 violations as a result. There was no suggestion Thompson was in any way responsible for instigating the prisoner action. Failure to participate in the work stoppage apparently exposed an

inmate to the risk of violence from other inmates. As one of the Board members explained at the hearing, "We're very familiar with . . . those 115s, and realize that you going to work would put yourself in harm's way, as well as possibly even staff, and other people . . . ." The 2003 rules violation thus arose from a dangerous and highly unusual situation, not of Thompson's making. It cannot be rationally inferred from this incident that Thompson is unable or unwilling to conform his conduct to societal rules, or poses a risk to society. (See *In re Palermo, supra,* 171 Cal.App.4th at p. 1110 [fact inmate once participated in a work strike did not support the conclusion that he posed a threat to public safety].)

The other two incidents referenced by the Governor involved CDC 128-A counseling incidents, or minor misconduct. CDC 128-A counseling incidents can, under appropriate circumstances, suggest unsuitability. In *In re Reed, supra,* 171 Cal.App.4th at pages 1084-1085, for example, the court found minor misconduct suggested unsuitability where it was recent and violated an express directive from a Board panel. *Prather* hypothesized that a disciplinary violation for reporting late to work might have probative value if the record demonstrated the inmate's criminality was tied to an inability to retain employment due to chronic tardiness. (*Prather, supra,* 50 Cal.4th at p. 256.) Under such circumstances, the misconduct may indicate an inmate is unable or unwilling to follow society's laws or the directions of his or her parole agent, or may have difficulty maintaining employment. (*In re Reed, supra,* at p. 1084.)

Here, however, the two instances cited by the Governor were not recent and did not involve Thompson's violation of an express Board directive. The relevant forms indicate that in May 2002, Thompson ran to the "television benches" despite a loudspeaker announcement not to run, and as a result was counseled for disobeying a direct order. In November 2002, he was found standing in front of his locker, an action which violated "count procedures." These infractions were characterized as minor within the prison discipline system, and involved no violence or gang-related conduct. They were few in number and occurred approximately seven years before the hearing and the Governor's decision. It is unreasonable as a matter of law to infer from these incidents

that Thompson is unable to conform to the rules of society or parole conditions. (See *In re Lawrence, supra,* 44 Cal.4th at p. 1224 [minor misconduct did not support reversal of suitability finding; "Nothing in the record supports a conclusion that [the inmate] poses a threat to public safety because she was occasionally late to appointments or job assignments during her almost 24 years of incarceration"].) The prison misconduct cited by the Governor therefore does not support the conclusion Thompson currently presents a risk to society if released.[4]

c. *Lack of insight.*

The Governor's third cited concern is Thompson's purported lack of insight into, and failure to accept full responsibility for, the crime, a factor that may support an unsuitability finding. (See, e.g., *In re Shaputis, supra,* 44 Cal.4th at p. 1260; *In re Twinn, supra,* 190 Cal.App.4th at p. 465; *In re Moses, supra,* 182 Cal.App.4th at p. 1307.) "[T]o the extent these factors show an inmate lacks insight into and understanding of the behavior precipitating the commitment offense, they can support a conclusion the inmate is currently dangerous." (*In re Twinn, supra,* at p. 465; *In re Shaputis, supra,* at p. 1260; *In re Rozzo* (2009) 172 Cal.App.4th 40, 62-63; *In re Smith* (2009) 171 Cal.App.4th 1631, 1639.) Lack of insight is probative of unsuitability "only to the extent that it is shown by the record and rationally indicative of the inmate's current dangerousness." (*In re Twinn, supra,* at p. 465.)

(i) *Initial denial of guilt.*

The Governor points out that in 1987, Thompson told police he was not involved in the crime, and pleaded guilty in order to obtain a favorable resolution of the case. The Governor is correct. Thompson denied involvement in the crime for at least two years, and in fact attempted to blame others. However, since at least 1997, Thompson has

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[4] In the course of describing Thompson's history, the Governor referenced his misbehavior while at CYA prior to 1993, as well as the fact he had been counseled a total of five times for minor misconduct while in CDC custody. The Governor does not appear to rely on Thompson's conduct at CYA, or the other three instances of minor misconduct, as factors supporting his reversal.

repeatedly and consistently accepted responsibility for the shooting and expressed remorse. Thompson's denials in 1987, over 20 years ago, do not by themselves demonstrate he is a current risk to society, where he long ago accepted full responsibility for the crime. (See *In re Gomez, supra,* 190 Cal.App.4th at p. 1308 [Governor's continued reliance on supposed lack of insight after inmate acknowledged crime inappropriately "transformed into an immutable factor" and effectively "transmute[d] petitioner's sentence into life without the possibility of parole"]; *In re Moses, supra,* 182 Cal.App.4th at pp. 1307-1308; *In re Elkins* (2006) 144 Cal.App.4th 475, 495.)

(ii) *Purported discrepancies in Thompson's account of the shooting.*

The Governor next points to four purported contradictions in Thompson's account of the crime given over the years as evidence of lack of accountability and insight. This assertion is primarily based on minor discrepancies between a 1997 Life Prisoner Evaluation (the 1997 Evaluation), and subsequent accounts given at Board hearings and described in psychological evaluations.[5] First, the 1997 Evaluation states that Thompson obtained the gun he used in the murder from a friend's apartment. At the 2006 hearing, Thompson stated he obtained it from a neighbor, and at the 2008 hearing, he stated that he obtained it from the trunk of a car. This discrepancy cannot, as a matter of law, reasonably be construed as evidence of a lack of insight or a failure to accept responsibility, let alone a showing of current dangerousness. Whether Thompson obtained the gun from a car trunk or an apartment, he admitted getting the gun, taking it to the park with the express purpose of shooting rival gang members, and firing it at them. Any discrepancy about the gun's original location does not involve an attempt by Thompson to minimize his role in the crime, nor does it have any bearing on his understanding of the factors that impelled him to act as he did.

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[5] At the 2008 hearing, Thompson explained he had not reviewed the 1997 Evaluation for accuracy. We nonetheless assume arguendo that the discrepancies are attributable to Thompson.

Second, the 1997 Evaluation stated that Thompson was not sure whether he or the rival gang members fired the first shots in the park. According to two subsequent psychological evaluations and his testimony at the 2006 and 2008 hearings, the rival gang members saw Thompson arrive and shot, whereupon Thompson immediately returned fire. Again, this discrepancy is immaterial. Thompson did not suggest the rival gang members fired first in an effort to exculpate himself or minimize his culpability. Thompson admittedly went to the park, armed with a gun, to shoot at his gang rivals, actions which precipitated the shootout. Thompson did not claim he fired in self-defense; did not assert that the rival gang members' actions absolved him of guilt; and did not contend he would have refrained from firing had the other side not fired first. There was no dispute that the rival gang members actually exchanged gunfire with Thompson; the district attorney, at the 2009 hearing, observed that shell casings found at the scene indicated "the people at the gymnasium were firing at Mr. Thompson."

Third, Thompson testified consistently at the 2006, 2008, and 2009 hearings that his best friend, Shawn, was shot by the rival gang and died either at, or en route to, the hospital. To avenge Shawn's death, Thompson armed himself and went to the park later that day to shoot rival gang members. The 1999, 2002, and 2007 psychological evaluations are consistent with this account. The 1997 Evaluation, however, describes the rival gang's drive-by shooting, but omits mention of Shawn's death. Thompson has consistently explained that Shawn was shot and killed since at least the year 1999, when the information appears in a psychological evaluation prepared for a January 2000 parole hearing. Nothing in the record suggests the account of Shawn's death is untrue, or is a belated fabrication offered to garner sympathy. Moreover, even in the 1997 Evaluation, Thompson admittedly carried out the shooting in revenge for the rival gang's drive-by shooting. The additional information that his friend was killed does not provide a defense to the crime.

Finally, the Governor points to purported contradictions regarding events immediately preceding the park shooting. The 1997 Evaluation stated that Thompson was so angry and confused after the rival gang's drive-by that "all he could think of doing

was shooting at the rival gang." He attempted to get others to accompany him. They refused, stating he was crazy and should not go, pointing out it was "in the middle of the afternoon, sunny," with "no coverage" available. He "just snapped and decided that he was going to do something, not just talk about it . . . ." The 2002 psychological evaluation similarly stated that he committed the shooting despite the exhortations of his friends. Thompson told the author of the 2007 psychological report that he had been confused and angry, wanted to avenge Shawn's death, and felt as though others expected him to " 'do something.' " At the 2008 hearing, Thompson explained that in the gang culture, it was expected that someone would retaliate for the rival gang's actions, and he volunteered, although his cousin attempted to talk him out of the shooting. At the 2009 hearing, he stated that he committed the shooting because he wished to avenge his friend, and acknowledged that he felt like he had to "prove something." The Governor contends these "discrepancies" demonstrate unsuitability, and the Warden characterizes them as "two separate accounts" of the crime.

The Governor has created a conflict where none exists. It is certainly possible, indeed likely, that a variety of factors were at play. Thompson could have been simultaneously angry and confused, felt others would expect him to do something in response to the shooting, and "snapped;" these emotions are not mutually exclusive. That retaliation is expected in the gang culture is well known. That a cousin and other persons attempted to dissuade Thompson from carrying out the shooting in broad daylight does not conflict with his statements about his feelings. The slight variations in Thompson's account do not strain credulity; to the contrary, they gel with common sense and the remainder of the record. (See *In re Palermo, supra*, 171 Cal.App.4th at pp. 1110-1112 [purported lack of insight into the crime did not support an unsuitability finding where the defendant's version of the shooting was not impossible or unlikely].) To the extent Thompson was able to articulate additional factors over time, this circumstance demonstrates increased insight, not the contrary. (See *In re Gomez, supra,* 190 Cal.App.4th at p. 1308 [fact inmate gave differing accounts of the crime over the years

did not support a finding of lack of insight where changes in his version of events were consistent with his newly developed insight gained through the prison's programs].)[6]

It is hardly surprising that minor variations will exist in accounts given to, and memorialized by, multiple evaluators over a course of many years, and testimony offered at multiple parole hearings conducted by different Board members who ask different questions, in a variety of ways. Simply combing the record for every minor, immaterial variation and them offering each up as evidence of lack of insight, without regard to their significance, is arbitrary and capricious and does not suffice to establish current dangerousness. We recognize, of course, that factual discrepancies regarding material and important aspects of the crime may well suggest a lack of insight or acceptance of responsibility. (See *In re Shaputis, supra*, 44 Cal.4th at pp. 1260; *In re Rozzo, supra,* 172 Cal.App.4th at pp. 61-63; *In re Smith, supra,* 171 Cal.App.4th at pp. 1638-1639; *In re McClendon* (2003) 113 Cal.App.4th 315, 322; *In re Taplett* (2010) 188 Cal.App.4th 440, 449-450.) But the discrepancies cited by the Governor do not involve attempts by Thompson to minimize or deny his conduct or culpability. (See *In re Moses, supra,* 182

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6 The Governor's decision also mentions, but does not expressly rely on, the fact Thompson gave contradictory accounts of whether he was a full-fledged gang member or merely a gang associate at the time of the murder. We observe that the probation report, prepared in 1989, states that Thompson admitted his gang membership, a fact he reiterated at the 2006, 2008, and 2009 hearings. The 1997 Evaluation related: "Mr. Thompson stated that he started associating with 'Menlow Gangster Crips' at approximately age 15. . . . Due to the severity of the facial and hand scar[r]ing, he was often laughed at and generally was not accepted by his peers while growing up. When he started associating with 'Menlow Gangster Crips' he finally felt as if he belonged and fit in with people who understood him. He further stated the gang overlooked his physical scarring and disability and accepted him for who he really was. Mr. Thompson stated he never officially joined the [gang] but did associate with them." As is readily apparent, Thompson did not, in 1997, attempt to disassociate himself from the gang or somehow use the fact he was only an associate in an effort to minimize his guilt. To the contrary, he fully acknowledged, as of 1997 and afterwards, that his ties to the gang led directly to his commission of the murder. Under these circumstances, the question of whether Thompson was a member of the gang or merely an associate is not probative of a lack of insight or acceptance of responsibility.

Cal.App.4th at p. 1310; *In re Juarez* (2010) 182 Cal.App.4th 1316, 1341-1342.) Thompson has "accept[ed] full responsibility" for the crime for years. The slight variations in the record are insignificant in light of Thompson's longstanding acceptance of responsibility for the crime and repeated expressions of remorse. (See *In re Moses, supra,* at p. 1310; *In re Juarez, supra,* at pp. 1341-1342.) Nor do they provide support for his purported lack of insight into the crime, dealing, as they for the most part do, with minor factual discrepancies. (See generally *In re Twinn, supra,* 190 Cal.App.4th at pp. 466-468.)

(iii) *Response to question at 2009 hearing.*

At the 2009 parole hearing, a panel member asked what triggered the murder. Thompson unhesitatingly answered, "A need to avenge my friend." He also stated there was more involved than simply revenge. The presiding commissioner then asked what caused Thompson to "want to be violent?" Thompson replied, "I have no idea." The Governor points to this response as evidence Thompson lacks insight into the crime.

If Thompson's response to the question was the *only* evidence in the record on the question of insight, the Governor's concern might well be supported by a modicum of evidence. However, that is not the case. It is undisputed that the murder was gang-related. Thompson expressed considerable insight into his reasons for joining the gang both at the 2009 hearing and earlier, explaining that he lacked self-esteem due to his life circumstances, especially his disfigurement, and sought out the gang because it made him feel better about himself. He felt he had to prove something and wished to please people, resulting in his making "bad choices. He had come to realize that gang membership was "horrible," "foolish," an "utter waste of time," and was self-destructive. Instead of seeking solace in the gang lifestyle, he understood, at the time of the 2009 hearing, that self-esteem comes from within and could be achieved through hard work and education. He felt he no longer needed the approval of gang members or similar persons, and due to his accomplishments, no longer believed he was "dumb[] and ugly," as he had been told in the past.

Thompson has repeatedly recognized that he committed the shooting in retaliation for the rival gang's earlier drive-by shooting. Thompson demonstrated an understanding of the emotions that impelled him to commit the shooting when he reported to the author of the 2007 psychological evaluation that he had been confused and angry, wanted to avenge his friend, and felt as though revenge was expected of him. He stated at the 2009 hearing that he has learned to address anger through meditation, exercise, and communication. The 2007 psychological evaluation concluded Thompson was "able to adequately analyze and explain his motivations, the social pressures and stressors acting in his youth, and his responses to them," and could articulate alternatives to violence and societally acceptable ways of meeting his needs. Thus, as the trial court concluded, during other periods of the hearing and in the most recent psychological evaluation, Thompson clearly articulated his motive and provided more insightful answers. "Expressions of insight and remorse will vary from inmate to inmate and there are no special words for an inmate to articulate in order to communicate he or she has committed to ending a previous pattern of violent or antisocial behavior." (*In re Twinn, supra,* 190 Cal.App.4th at p. 465.) A single inarticulate answer plucked from the record does not, in this instance, provide "some evidence" of a lack of insight.

In sum, as a factual matter, there is not a modicum of evidence showing Thompson lacks insight into, or has failed to accept responsibility for, the crime.

d. *Summary.*

While the combination of factors cited by the Governor—the nature of the commitment offense, a lack of insight into the crime, and prison misconduct—could be predictive of current dangerousness under appropriate circumstances (see, e.g., *In re Twinn, supra*, 190 Cal.App.4th at p. 470), that is not the case here. While we are ever mindful of the deferential nature of the standard of review, we are forced to conclude that, as a matter of law, there is an absence of "some evidence" supporting the Governor's decision. Two of the factors cited by the Governor lack evidentiary support, and the Governor has not established a reasonable nexus between the third, that is, the circumstances of the commitment offense, and a current risk to public safety. "[M]ere

recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*In re Lawrence, supra,* 44 Cal.4th at p. 1227.) Because the Governor's decision was not supported by a modicum of evidence, the reversal violates Thompson's due process rights, and the trial court properly granted Thompson's petition for a writ of habeas corpus. (*Ibid*.)

4. *Remedy.*

Having concluded that the record lacks "some evidence" to support the Governor's reversal, we turn to the question of the proper remedy. The trial court ordered the Governor's decision vacated, the Board's decision reinstated, and Thompson released in accordance with the date calculated by the Board. The People urge that the trial court should instead have remanded the matter to the Governor for reconsideration.

Courts, including this one, have repeatedly held that the proper remedy when the Governor's reversal of a suitability finding is not supported by the evidence is reinstatement of the Board's decision without remand to the Governor. (See, e.g., *Masoner, supra,* 179 Cal.App.4th at pp. 1534, 1539; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491-1492; *In re Moses, supra,* 182 Cal.App.4th at p. 1313; *In re Vasquez, supra,* 170 Cal.App.4th at p. 387; *In re Loresch* (2010) 183 Cal.App.4th 150, 162-163; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 257; *In re Burdan, supra,* 169 Cal.App.4th at p. 39.) In *Masoner,* we reasoned that when the Governor has already reviewed the Board's decision, he has been "given a full opportunity to exercise his constitutional and statutory right of review." (*Masoner, supra,* at p. 1537.) Thus, reinstatement of the Board's decision does not divest the Governor of his right to review Board decisions. (*Id.* at p. 1538.) We further reasoned that allowing the Governor an unlimited number of reviews of the Board's decision would violate a prisoner's due process rights and render the writ of habeas corpus meaningless. (*Id.* at p. 1539.) The Governor could arbitrarily detain a prisoner indefinitely, without evidence of current dangerousness, yet the courts would have no practical power to grant relief. "The rule proposed by appellant would entitle the Governor to repeatedly 'reconsider' the release of

the prisoner no matter how many times the courts found that there was no evidence that the prisoner was currently dangerous[,]" violating principles of due process and eviscerating judicial scrutiny of parole decisions. (*Id.* at p. 1540.)

Despite the foregoing, the Warden posits that remand to the Governor for reconsideration is mandated in light of the California Supreme Court's recent decision in *Prather, supra,* 50 Cal.4th 238. We disagree. In *Prather,* the court considered two matters, *In re Prather* and *In re Molina,* in which appellate courts had found the *Board*'s parole denials unsupported under the "some evidence" standard. In the *Prather* matter, the appellate court had directed the Board to find the inmate suitable for parole unless, after a hearing, new and different evidence supported a determination he currently posed an unreasonable risk of danger if released. (*Id*. at p. 246.) In the *Molina* matter, the appellate court had ordered the matter remanded with instructions to release the inmate without review of the decision by the Governor. (*Id.* at pp. 248, 253.)

Prather reasoned, "the statutes and governing regulations establish that the decision to grant or deny parole is committed entirely to the judgment and discretion of the Board, with a constitutionally based veto power over the Board's decision vested in the Governor." (*Prather, supra,* 50 Cal.4th at p. 251.) When evaluating whether an inmate continues to pose a threat to public safety, both the Board and the Governor must consider all relevant statutory factors. (*Id.* at p. 255.) Judicial review of the merits of the Board's or Governor's decisions to grant or deny parole is required by due process. (*Id*. at p. 251.) However, "by purporting to limit the Board's consideration of all relevant statutory factors, the decisions in both" *Prather* and *Molina* infringed upon the authority of the executive branch to make parole suitability determinations. (*Id*. at p. 253.) The order in *Prather*, which limited the Board to consideration of new evidence of the inmate's conduct in prison since his last parole hearing, improperly impaired the Board's exercise of its inherent discretion to decide parole matters. (*Id.* at pp. 255-256.) The limiting directive prohibited the Board from considering, inter alia, the fact the inmate no longer had documented parole plans, as well as his most recent psychological evaluation. Neither item could be fairly characterized as "conduct in prison," but both were

potentially probative on the issue of current parole suitability and were required to be considered. (*Id.* at p. 256.) Further, "old" evidence already in the record, but not previously cited by the Board, might take on new relevance when considered in light of new evidence. (*Id.* at p. 256.) The lower court's order thus improperly "sanction[ed] the narrow type of evaluation" specifically disapproved in *In re Lawrence, supra,* 44 Cal.4th at page 1214. (*Prather,* at p. 255.) The order in *Molina* was deficient for the same reasons; worse, it improperly intruded upon the Governor's constitutional authority by ordering Molina's release prior to *any* review of the decision by the Governor. (*Id.* at p. 257.)

Prather was careful to point out, however, that a court could, in appropriate circumstances, expressly state in its remand order that the Board might not base an unsuitability determination solely upon evidence already considered and rejected by the reviewing court. (*Prather, supra,* 50 Cal.4th at pp. 257-258.) *Prather* reasoned that such language in an order was generally unnecessary because the Board is bound by a court's conclusion that no evidence in the record supports an unsuitability finding. (*Id.* at p. 258.) A "judicial order granting habeas corpus relief implicitly precludes the Board from again denying parole—unless some *additional* evidence (considered alone or in conjunction with other evidence in the record, and not already considered and rejected by the reviewing court) supports a determination that the prisoner remains currently dangerous." (*Ibid.*) "[A]lthough a reviewing court may expressly limit the Board's reliance upon evidence the court already has considered and rejected as insufficient, the court should avoid issuing directives that improperly limit the Board's statutory authority to review and evaluate the full record . . . ." (*Ibid.,* italics omitted.)

The Warden contends that the "same traditional remedy provided to the Board in *Prather* should be provided when a gubernatorial parole decision is found to violate due process." The Warden urges that, as in *Prather,* Thompson's release would usurp the parole suitability decision from the executive branch and violate separation of powers principles. But *Prather* addressed, not a Governor's unsupported reversal of a parole suitability finding, but the Board's determination that the inmate was unsuitable, a

question left open in *Lawrence* and *Shaputis.* (*Prather, supra,* 50 Cal.4th at p. 252.) Indeed, in *Lawrence,* a case involving reversal of the Governor's decision, the California Supreme Court did *not* remand to the Governor for reconsideration. There, the Court of Appeal had vacated the Governor's decision, reinstated the Board's decision, and ordered the inmate's release, without return to the Governor for further consideration. *Lawrence* affirmed the appellate court's decision. (*In re Lawrence, supra,* 44 Cal.4th at p. 1229; see *Masoner, supra,* 179 Cal.App.4th at p. 1537; *In re McDonald* (2010) 189 Cal.App.4th 1008, 1023; *In re Burdan, supra,* 169 Cal.App.4th at p. 39.)

As recently explained by our colleagues in Division Seven, *Prather* does not compel the result sought by the Warden. (*In re McDonald, supra* 189 Cal.App.4th at pp. 1023-1024; *In re Twinn, supra,* 190 Cal.App.4th at pp. 472-473.) Unlike the limitations placed on the Board in *Prather* and *Molina,* reinstatement of the Board's decision does not implicate separation of powers concerns: "Here . . . we reinstate an earlier executive branch decision—made by the Board—overturning only the 'veto' of that decision by the Governor. [Citation.] The power of the executive branch is, in this instance, not infringed, but respected." (*In re McDonald, supra,* at p. 1024.)

Second, reinstating the Board's decision does not improperly limit the executive's ability to consider the full record, nor does it compromise the integrity of the executive's decision. (See *Prather, supra,* 50 Cal.4th at pp. 255-256.) "Unlike the Board, which has the obligation and ability to take evidence, consistent with due process protections, the Governor cannot create an evidentiary record. A return to the Governor for reconsideration would therefore mean that the Governor could look again only at the record before him on initial consideration, the same record this court has reviewed. We have reviewed that record, and neither the Governor, nor the Board, has the authority to ' "disregard a judicial determination regarding the sufficiency of the evidence [of current dangerousness] and to simply repeat the same decision on the same record." ' [Citation.]" (*In re McDonald, supra,* 189 Cal.App.4th at p. 1024.)

Here, the judicial finding that the Governor's decision is unsupported by a modicum of evidence precludes him from coming to the same conclusion on the same record. (*Prather, supra,* 50 Cal.4th at p. 258.) The approach suggested by the Warden would impermissibly allow the Governor multiple reviews of the same record, a result not contemplated by the state Constitution. *McDonald* rejected the notion that the Governor should be permitted to review the *same* record again in hopes of finding additional facts demonstrating current dangerousness. (*In re McDonald, supra,* 189 Cal.App.4th at p. 1025.) The state Constitution allows for "a single review by the Governor of a determination by the Board," and does "not authorize repeated reviews of that single determination." (*Id.* at p. 1024; *In re Twinn, supra,* 190 Cal.App.4th at p. 473.) "[D]ue process and a prisoner's right to a fair hearing require[ ] that 'the Governor should state all of the reasons for his determination in the first instance, permitting prompt review, compliance with [c]onstitutional mandates, and a predictable process'. . . ." (*In re Twinn, supra,* at p. 473.) Remand to the Governor where the "some evidence" standard is unmet would "result in constitutionally impermissible opportunities to ' "simply repeat the same decision on the same record." ' " (*In re Twinn, supra* at p. 473, citing *Prather, supra,* at p. 258.)

The Warden also urges that *McDonald* does not satisfactorily address the possibility that circumstances subsequent to the 2009 parole hearing might require a finding that Thompson is no longer suitable for parole. He points out that that a subsequent parole hearing was conducted in 2010, providing "an updated record for the Governor to review."[7] If we were to simply remand to the Governor for review of the subsequent 2010 parole hearing, Thompson's right to review of the 2009 hearing would effectively evaporate. Moreover, if the warden's position is accepted, an inmate could easily be caught in an endless loop of parole hearings, gubernatorial reversals, and remands for reconsideration. If, for example, we remanded for the Governor's

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[7] The record does not disclose the outcome of that hearing.

reconsideration of the record, including the 2010 hearing, the Governor again reversed, and that reversal was again determined to lack evidentiary support, under the Warden's theory Thompson would still not be entitled to release; instead, the matter would have to be remanded *again* for the Governor's reconsideration of the *next* subsequent parole hearing, and so on and so on. As we explained in *Masoner,* under these circumstances the writ of habeas corpus would become meaningless because the inmate could be arbitrarily detained indefinitely. (*Masoner, supra,* 179 Cal.App.4th at p. 1540.)

We agree, however, that provision must be made for the unlikely and theoretical possibility that circumstances could have arisen in the interim between the last parole hearing and the present, that rendered Thompson unsuitable for parole. (See *Prather, supra,* 50 Cal.4th at p. 256; *In re Twinn, supra,* 190 Cal.App.4th at p. 473.) Public safety is the paramount consideration in parole decisions. (*In re Shaputis, supra,* 44 Cal.4th at p. 1254; *In re Lawrence, supra,* 44 Cal.4th at p. 1210; *In re Twinn, supra,* at p. 463.) For that reason, we agree that outright release is not the appropriate remedy. Instead, we agree with *In re Twinn* that the matter should be remanded to the Board with directions to proceed in accordance with its usual procedures for release of an inmate on parole, unless the Board determines in good faith that cause for rescission of parole may exist, and initiates timely proceedings to determine that question. (*In re Twinn, supra,* at p. 474; see also *In re Moses, supra,* 182 Cal.App.4th at p. 1315 & fn. 15.)

DISPOSITION

The trial court's order is affirmed insofar as it grants Thompson's petition for a writ of habeas corpus, reverses the Governor's October 5, 2009 decision, and reinstates the Board's May 13, 2009 decision. The trial court's order is reversed insofar as it orders Thompson's immediate release. The matter is remanded to the Board, which shall proceed in accordance with its usual procedures for release of an inmate on parole unless within 30 days of the finality of this decision the Board determines in good faith that cause for rescission of parole may exist and initiates timely and appropriate proceedings to determine that question. In the interests of justice, this opinion is made final as to this court five days from the date of filing. (*In re Dannenberg, supra,* 173 Cal.App.4th at p. 257; *Masoner, supra*, 179 Cal.App.4th at p. 1541.)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.